

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CHRISTOPHER SELLS and TIMOTHY
MURAWSKI,

Defendants.

No. C 11-4941 CW

ORDER DENYING
DEFENDANTS' MOTION
FOR CERTIFICATION
OF ORDER FOR
APPEAL

Defendant Christopher Sells moves for an order certifying an interlocutory appeal of the August 10, 2012, order denying Defendants' motion to dismiss. Defendant Timothy Murawski joins in the motion for certification. Defendants seek certification for appeal of two issues:

1. Where a defendant did not "make" an alleged misstatement under Janus Capital Group, Inc. v. First Derivative Traders, 131 S.Ct. 2296 (2011), may the SEC nonetheless bring scheme liability claims under Rule 10b-5(a) and (c) premised on such a misstatement?
2. Does the holding of Janus apply to claims under Section 17(a) of the Securities Act?

Having reviewed Defendants' moving papers, the Court determines that the matter is suitable for decision without further briefing or oral argument, and DENIES the motion for the

1 reasons set forth below. The motion hearing noticed for November
2 15, 2012 is hereby VACATED.

3 LEGAL STANDARD

4 Pursuant to 28 U.S.C. § 1292(b), a district court may certify
5 an appeal of an interlocutory order only if three factors are
6 present. First, the issue to be certified must involve a
7 "controlling question of law." 28 U.S.C. § 1292(b). Establishing
8 that a question of law is controlling requires a showing that the
9 "resolution of the issue on appeal could materially affect the
10 outcome of litigation in the district court." In re Cement
11 Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982) (citing U.S.
12 Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)).

13 Second, there must be "substantial ground for difference of
14 opinion" on the issue. 28 U.S.C. § 1292(b). "A substantial
15 ground for difference of opinion exists where reasonable jurists
16 might disagree on an issue's resolution, not merely where they
17 have already disagreed." Reese v. BP Exploration (Alaska) Inc.,
18 643 F.3d 681, 688 (9th Cir. 2011).

19 Third, it must be likely that an interlocutory appeal will
20 "materially advance the ultimate termination of the litigation."
21 28 U.S.C. § 1292(b); In re Cement, 673 F.2d at 1026. In light of
22 the legislative policy underlying § 1292 that the statute be used
23 only in exceptional situations, an interlocutory appeal should be
24 certified only when doing so "would avoid protracted and expensive
25 litigation." In re Cement, 673 F.2d at 1026. If, by contrast, an
26 interlocutory appeal would delay resolution of the litigation, it
27 should not be certified. See Shurance v. Planning Control Int'l,
28 Inc., 839 F.2d 1347, 1348 (9th Cir. 1988).

1 "Section 1292(b) is a departure from the normal rule that
2 only final judgments are appealable, and therefore must be
3 construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d
4 1064, 1068 n.6 (9th Cir. 2002). Thus, the court should apply the
5 statute's requirements strictly, and should grant a motion for
6 certification only when exceptional circumstances warrant it.
7 Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). The party
8 seeking certification of an interlocutory order has the burden of
9 establishing the existence of such exceptional circumstances. Id.
10 A court has substantial discretion in deciding whether to grant a
11 party's motion for certification. Brown v. Oneonta, 916 F. Supp.
12 176, 180 (N.D.N.Y. 1996), rev'd in part on other grounds, 106 F.3d
13 1125 (2nd Cir. 1997).

14 DISCUSSION

15 Defendants do not meet their burden under § 1292 to show that
16 it is likely that an appeal will materially advance the ultimate
17 termination of this litigation. On the contrary, an immediate
18 appeal is likely to delay, rather than advance, the end of this
19 case. The complaint initiating this action was filed on October
20 6, 2011, and after the Court issued its decision denying
21 Defendants' motion to dismiss, Defendants filed their answers to
22 the complaint on August 24, 2012. The parties have engaged in
23 discovery, and the Court will hold a case management conference on
24 October 24, 2012, to set deadlines and pretrial and trial dates in
25 this action. To certify an interlocutory appeal at this juncture
26 would certainly delay the litigation, whereas an interlocutory
27 appeal could only materially advance the ultimate termination of
28

1 this litigation if the Ninth Circuit accepts the appeal and rules
2 in favor of Defendants on all the above-mentioned issues.

3 Furthermore, as Defendants acknowledge, resolution of the
4 issues on which they seek appeal would not address all claims
5 asserted against either Defendant. See Mot. at 7 ("If, as Mr.
6 Sells urges, the SEC's First Claim for Relief under Rule 10b-5(a)
7 and (c) and its Third Claim for Relief under Section 17(a) must be
8 dismissed, then . . . [t]he primary focus of the SEC's remaining
9 claims against Mr. Sells would [] be aiding-and-abetting.").
10 Thus, even if the Ninth Circuit were to rule favorably for
11 Defendants on interlocutory appeal, the parties would nevertheless
12 continue to litigate this action. Defendants therefore fail to
13 meet their burden to show the likelihood that immediate appeal
14 would materially advance the ultimate termination of the
15 litigation.

16 CONCLUSION

17 For the foregoing reasons, the Court DENIES Defendants'
18 motion for certification of an interlocutory appeal. (Docket No.
19 72.)

20
21 IT IS SO ORDERED.

22
23 Dated: 10/15/2012

24 
25 CLAUDIA WILKEN
26 United States District Judge
27
28